Supreme Court, U.S.
FILED
SEP 2 1987
JOSEPH F. SPANIOL, JR.
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NO. 86-1971

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1986

CHARLES COLEMAN,

PETITIONER,

VS.

J.D. WHITE, WARDEN,
ATTORNEY GENERAL OF ALABAMA,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF AND ARGUMENT IN OPPOSITION TO THE PETITION

OF

DON SIEGELMAN
ALABAMA ATTORNEY GENERAL

JAMES B. PRUDE
ASSISTANT ALABAMA ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
The Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

QUESTIONS PRESENTED

I.

WHETHER THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT WAS CORRECT IN AFFIRMING THE DISTRICT COURT'S DISMISSAL OF THIS PETITION ON THE GROUND OF ABUSE OF THE WRIT WHEN PETITIONER HAD ATTACKED THIS CONVICTION IN THREE PREVIOUS WRITS WHICH CONTAINED OTHER ALLEGATIONS AND WERE DISMISSED EITHER FOR LACK OF MERIT OR FOR BEING REPETITIOUS? YES

II.

WHETHER THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT? NO

III.

WHETHER THIS PETITION PRESENTS ANY ISSUE OF FEDERAL LAW WHICH REQUIRES A DETERMINATION BY THIS COURT? NO

PARTIES

All of the parties to this proceeding are contained in the caption and style of this petition.

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OPINIONS BELOW

The opinion of the United State Court of Appeals for the Eleventh Circuit is reproduced in the Petitioner's petition for certiorari.

The Memorandum Opinion and the Judgement of the district court are

reproduced in Petitioner's petition for certiorari and will be omitted from Respondents' brief in opposition.

JURISDICTION

Authority for this Court to review the judgement of the Eleventh Circuit Court of Appeals is contained in 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Rule 9(b), Rules Governing §2254 cases [statute is reproduced in Petitioner's brief].

STATEMENT OF THE CASE AND FACTS

Petitioner's Statement of the Case is substantially correct and is hereby adopted as Respondents' Statement of the Case subject to the following addendum:

Petitioner offered only one explanation for his failure to include his present claims of constitutional defects in his prior petitions: he stated that he did not include them because they had not been presented to state court for exhaustion before the prior petitions were filed.

REASONS FOR DENYING THE PETITION

I.

THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE STATE MET ITS BURDEN OF PROVING THAT PETITIONER HAD ABUSED THE WRIT BY FAILING TO INCLUDE THE PRESENT GROUNDS IN THE PRIOR PETITIONS.

Petitioner cites Potts v. Zant, 638 F.2d 727, 745 (5th Cir. 1981) for the proposition that, "a finding of 'abuse of the writ' requires a determination by the trial court that the petitioner's conduct and motive for the failure to bring all claims in one petition indicates 'a deliberate withholding' of these claims or 'inexcusable neglect'". However, a finding that Petitioner had no valid reason for not including these claims in the prior petition was implicit in the District Court's decision to dismiss the

petition on the ground of abuse of the writ.

In its Memorandum Opinion, the district judge noted that this was Petitioner's third petition attacking this conviction. [See copy of the Memorandum Opinion reproduced at A-17 of Petitioner's brief for certiorari]. The district judge duly noted that each allegation contained this third petition could have been included in the initial petition. Having determined that the claims could have been brought, the only remaining determination was whether Petitioner had a valid legal excuse for not including them. See Daniels v. Blackburn, 763 F.2d 707 (5th Cir. 1985), wherein the court stated: "The proper inquiry in determining whether a habeas petitioner has abused the writ by failing

to raise claims in a prior habeas petition is not whether the petitioner intended to waive the claims, but whether he withheld them without legal excuse."

The Eleventh Circuit did not depart from established judicial standards in order to affirm the district court's decision. In response to the Respondents' allegation of abuse of the writ, Petitioner alleged that he had withheld these claims from the earlier petitions because they had not been exhausted in state court when the earlier federal petitions had been filed. Under the prevailing standards, this excuse was clearly an inadequate justification for failure to include the claims in the earlier petitions. See Jones v. Estelle, 722 F.2d 159 (5th Cir. 1983). The sole fact that the new claims were unexhausted

when the earlier federal writ was prosecuted will not excuse their omission." Id at 168. In addition, the court in Jones, supra, stated:

> "We hold only that a petitioner who has persisted in the prosecution of a federal writ while aware of additional but unexhausted claims faces the hurdle of disproving abuse when in a successive petition he presents the omitted claims." Id at 169.

See also Rudolph v. Blackburn, 750 F.2d 302 (5th Cir. 1984). While Petitioner argues that neither the Eleventh Circuit nor district court was able to point to any fact which supported the district court's decision, it should be recognized that Petitioner's explanation of his decision to withhold the present claims from the prior petitions was inself a sufficient "fact" from which the Court could find "inexcusable neglect" as a matter of law.

II.

THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH ANY APPLICABLE DECISIONS OF THIS COURT.

The decision of the Eleventh Circuit is in compliance with the letter and spirit of Sanders v. United States, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963). In Sanders, the Court stated:

> "if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground.... Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay." Id.

This principle of Sanders was formally adopted and codified in Rule 9(b) of 28 U.S.C. §2254. Clearly, the purpose of this rule was to prevent prisoners from doing exactly what Petitioner had done in this case: deliberately withholding possible federal claims from the first petition with the notion of presenting those claims in a subsequent petition.

Petitioner argues that the district court's dismissal of this present petition constituted res judicata in violation of Sanders, supra. However this is incorrect. The claims presented in the present petition were totally new claims and the district court did not dismiss them on the ground that the claims had already been examined in a prior petition. ie. res judicata. Rather, the district court refused to

consider the merits of the claims after the court had determined that the claims could have been raised in the prior petitions. This decision did not breach the equitable principles of Sanders, supra, on which Petitioner relies.

Petitioner also argues that he was unaware that his failure to include all grounds asserted for relief in the earlier petitions would bar him from asserting withheld claims in a later petition. However, the record refutes this claim. The form habeas petition used by Petitioner in all of his federal proceedings warned that he must set forth all grounds for relief in the petition because he could be barred from presenting additional grounds in a subsequent petition. [Eleventh Circuit Court of Appeals' Opinion, page 7]. Not

only was the Court of Appeals correct in finding that Petitioner was sufficiently advised of his need to assert all grounds for relief, the Court of Appeals could also take notice of a previous case wherein both it and the same district court judge who decided this present petition had recognized that Petitioner had a "demonstrated proficiency in drafting and filing petitions for habeas corpus", Coleman v. White, No. 85-7389 (11th Cir. Dec. 13, 1985). The Court of Appeals was clearly correct in holding this Petitioner to a higher standard than it would probably apply to prisoners who are strangers to the federal habeas proceedings.

III.

THE PETITION PRESENTS NO IMPORTANT ISSUE OF FEDERAL LAW WHICH REQUIRES A DETERMINATION BY THIS COURT.

Petitioner seeks review of his petition on the ground that the guidelines in Sanders v. U.S., supra, are too broad to give the lower federal courts sufficient direction with regard to the meaning of "deliberate withholding" or "inexcusable neglect". However, contrary to the idea implicit in this assertion, the Circuit Courts, in particularly the Fifth Circuit, are fairly consistent in their interpretation that Sanders prohibits a petitioner from pursuing exhausted claims in an initial federal petition and then attempting to pursue the additional claims in a second petition only after the initial petition

has been denied. See Jones v. Estelle, 722 F.2d 159 (5th Cir. 1983); Rudolph v. Blackburn, 750 F.2d 302 (5th Cir. 1984). Sanders needs no clarification on this issue.

Petitioner argues that he did not understand the "abuse of the writ" doctrine and therefore, his conduct could not have amounted to inexcusable neglect. He further argues that he was acting pro se and was uneducated in the law. However, the Court of Appeals considered this argument and dismissed it because it was obvious that Petitioner understood the doctrine of exhaustion very well. The Court of Appeals noted that even though Petitioner was aware of his need to exhaust state remedies before submitting them to the federal court, Petitioner did not attempt to exhaust

them until after his initial federal petitions were denied. [Court of Appeals' Opinion, page 6]. In addition, as earlier noted in this brief, the Court had, in a previous case, recognized Petitioner's proficiency in habeas corpus law. See Coleman v. White, supra. There was simply no excuse for Petitioner's failure to raise the claims in the earlier petitions.

Petitioner attempts to justify his failure to raise the unexhausted claims in the prior petitions on the ground that, had the unexhausted claims been raised along with the exhausted claims, the earlier petitions would have been subject to dismissal under Rose v. Lundy, 455 U.S. 509 (1982). Therefore, Petitioner reasons, since he could not have brought the unexhausted claims at

the time the exhausted claims were presented, he cannot be said to have "abandoned" or "deliberately withheld" those unexhausted claims. However, as the Court of Appeals noted, this question need not be addressed in this case because it is obvious that Petitioner had no intention of presenting these unexhausted claims for federal review until after the federal court had denied the prior petitions. Petitioner's excuse for unexhaustion was inadequate as a matter of law. Petitioner's situation is unlike Rose, supra, because a "mixed petition" is at least evidence that the prisoner is attempting to present all possible claims for review. The facts of this case establishes very clearly that there was no excuse for Petitioner's failure to either exhaust his state

remedies before filing his initial federal petition or failure to include all of his claims in the initial petition even if his petition would have been "mixed". In such a case, the district court could have instructed the Petitioner to exhaust his state remedies as to all claims prior to seeking federal review of any of his claims. This would ensure that the Court would have to review only one petition. By withholding his claims, the Petitioner attempted to obtain three federal reviews of his conviction and his conduct can be considered nothing short of abuse of the writ.

Lastly, Petitioner argues that the District Court should have given him an opportunity to explain to the Court why he failed to include the grounds in the prior petition. However, an evidentiary

hearing was not needed for the Petitioner to respond to Respondents' allegation of abuse which was made in Respondents' return.

Petitioner had adequate time and opportunity to respond to Respondents' allegation, and in fact, did respond by alleging that he had not abused the writ because the grounds were being exhausted in state court. The district judge was strictly within his discretion in dismissing the petition without a hearing because "[i]f the answer is inadequate, the Court may dismiss the petition without further proceedings." Potts, [I], supra. There was no "substantial conflict" between the allegations of Respondents and Petitioner as to the reasons for the exclusion of the grounds and there was no need for a hearing to determine the "actual facts" involved.

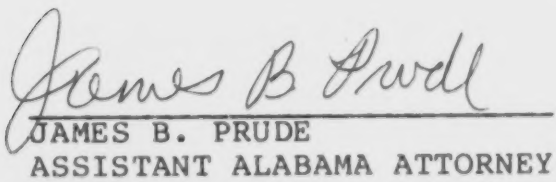
Potts, I, supra; Potts v. Zant, 734 F.2d 526 (11th Cir. 1984), [Potts, II]; Price v. Johnston, 334 U.S. 266, 68 S.Ct. 1049, 92 L.Ed.2d 1356 (1948). The Court of Appeals was correct in deciding that the district court did not err by failing to grant an evidentiary hearing.

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

Respectfully submitted,

DON SIEGELMAN
ALABAMA ATTORNEY GENERAL
BY-



JAMES B. PRUDE
ASSISTANT ALABAMA ATTORNEY GENERAL

ADDRESS OF COUNSEL:

Office of the Attorney General
The Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

CERTIFICATE OF SERVICE

I, James B. Prude, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, hereby certify that on this 1st day of September, 1987, I did serve the requisite number of copies of the foregoing on the Attorney for the Petitioner, by mailing the same to said attorney, first-class postage prepaid and addressed as follows:

Honorable William C. Humphreys, Jr.
Alston & Bird
35 Broad Street
Atlanga, Georgia 30335

James B. Prude

JAMES B. PRUDE
ASSISTANT ALABAMA ATTORNEY GENERAL

ADDRESS OF COUNSEL:

Office of the Attorney General
The Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300